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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION EX REL., MOULDING-BROWNELL CORPORATION, ET AL.,
Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION BY APPELLEES TO DISMISS OR AFFIRM.

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MAY IT PLEASE THE COURT:

This case presents an appeal from an order of the Supreme Court of Illinois, affirming an order of the Circuit Court of Cook County which, in turn, sustained an order of the Illinois Commerce Commission. The order of the Commission requires appellant to expend its funds in the maintenance of a switch track connected with its main line, but which switch track was not constructed by it, is not located upon its property and is not owned by it. The appeal to this court is based upon a claimed violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States, the claim being made before the Commission, in the Circuit Court, and in the

Supreme Court of Illinois, which passed upon it adversely to appellant's contentions.

The motion to dismiss or affirm concedes that the claim of a violation of appellant's rights under the Federal Constitution was seasonably made, but contends that the federal question involved is not sufficiently substantial to warrant consideration by this Court. We will deal with the argument made in appellees' statement in opposition to jurisdiction in the order in which that argument is made.

(1) *The Facts.*

Included in the transcript of record filed in this court is the abstract of record filed in the Supreme Court of Illinois, and the references herein will be to the pages of that abstract. Facing page 59 of that abstract is a map showing in yellow the track here involved. It is 2,831 feet in length, and five spur tracks extend from it to the appellee industries. The five spurs are not here involved, as they are owned and maintained by the industries.

The facts as set out in appellees' statement are in substance correct, but require some elaboration. It is said that from 1904 up to the present time, appellant and its predecessors in interest have maintained the track involved, although disputing their obligation to do so since 1923. This statement is correct, but it should be added that from November 1, 1904 up to March 26, 1936, these maintenance charges were paid by appellant pursuant to an agreement dated November 1, 1904, between the predecessors of appellant and the predecessors of appellees, Peoples Gas Light & Coke Company and Commonwealth Edison Company (A. 99, 100). This contract was terminated by appellant on March 26, 1936 (Pet. Ex. 15, A. 105), and since that date there has been no contractual obligation upon appellant to incur this expense.

The cost of maintaining the track for the next three years will be approximately $4,000.00 a year, and thereafter will amount to approximately $1,000.00 a year (A. 68, 69), the high cost of maintenance being due to the partial elevation of the track over certain streets and alleys in Chicago. In addition, appellant paid $1,400.00 a year license fee to the City of Chicago from 1923 to 1932 (A. 77), and since 1932, has paid $700.00 a year (A. 78). This charge is made by the City for the occupancy of public streets and alleys by the track. Of this amount paid by appellant, only $900.00 has been refunded to it by appellee, Peoples Gas Light & Coke Company (A. 78). The present ordinance charge made by the City is $700.00 per year (See Pet. Ex. 14, A. 104).

The track here involved is the only switch track not owned by appellant and not located on its right of way, which it maintains at its own expense. In all other instances of switch track not owned by appellant and not on its right of way, the industry served by such track maintains, repairs and renews the track and secures the right of way (A. 70, 71). Under the standard form of switch track agreement used by appellant, the industry to be served by a switch track supplies the right of way therefor over its property and that of third parties, and also pays all maintenance charges (A. 76; See Pet. Ex. 19, A. 106).

(2) *Procedure Followed by Appellant.*

It is urged in appellees' statement that having submitted to the jurisdiction of the Illinois Commerce Commission, appellant is estopped to deny the authority of the Commission to enter an order in the exercise of the jurisdiction which appellant invoked. It is suggested that if appellant is right in its present contention, it could have

discontinued service over the track without authority of the Commission.

Under Section 49-A, Illinois Public Utility Act (Chapter 111⅔ page 2489, Ill. Rev. Stat. 1937) public utilities are not permitted to abandon or discontinue any service without having first secured the approval of the Commission. Appellant's petition was filed under this section of the law. At the time it was filed, there was already pending before the Commission, a complaint made by certain appellee industries, which complaint charged a threat of the discontinuance of service over the track, and sought an order requiring that service be continued

Under Sections 80 and 81 of the same Act (Chapter 111⅔, page 2500, Ill. Rev. Stat. 1937) the penalty for any violation of the Act by a corporation is a fine of not less than $500.00, nor more than $2,000.00 for each and every offense, and in case of a continuing violation, each day's continuance thereof is a separate and distinct offense; also the officers of such corporations become liable to a fine of $1,000.00 and imprisonment for one year. Thus, if appellant had discontinued service over the track here involved without authority of the Commission, it and its officers would have been subject to the penalties prescribed by Illinois law, unless it had been able to make good the argument which it now presents. In the event of a failure to make that argument good, appellant would find itself in the position of the appellant in *Wadley Southern Railway Co.* v. *Georgia*, 235 U. S. 651. There is no requirement that appellant assume this risk.

Moreover, such action would have been improper under decisions of this court. In *Western & Atlantic Railroad* v. *Public Service Commission*, 267 U. S. 493, the railroad company discontinued a service without application to the state Commission, although the Georgia law required such an

application. The Commission thereafter making an order, the suit was to enjoin the enforcement thereof. Sustaining the order, this court (p. 496) designated the action of the railroad company as being arbitrary and defiant. *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U. S. 300, involved the same Public Utilities Act of Illinois to which we have referred. In that case the order of the lower court, denying an application for an interlocutory injunction, was sustained upon the ground that the administrative remedies afforded by the Illinois law had not been exhausted by appellant. On this point see also *Texas & Pacific R. Co.* v. *Gulf etc. Railway*, 270 U. S. 266, 279, and *Piedmont etc. Railway* v. *Commission*, 286 U. S. 299.

Appellant has consistently followed an orderly procedure in trying out the question here involved. It first went to the Commission as required by law; appealed the order of the Commission to the Circuit Court of Cook County, and then took a further appeal to the Supreme Court of Illinois. It has exhausted its remedies in those forums, and its only present recourse is to this court. All considerations demonstrate the propriety of handling the matter in this manner. An arbitrary discontinuance of service by appellant, upon the assumption that any order requiring such service to be continued would be unlawful, would not only have exposed appellant to the possibility of exceedingly heavy penalties, but would have been arbitrary and defiant of Illinois authority, and would have imposed substantial loss upon the industries now served by the track involved. In fairness, those industries deserved an opportunity to retain the service, if it is sufficiently desired by them to warrant them in making the necessary expenditures to maintain the track.

McDonald v. *Oregon Navigation Co.*, 233 U. S. 665, does not sustain appellees' contention on this point. That was

an equity suit by the railroad company to enjoin interference with certain property which it claimed to own. Instead of taking the position that the court did not have jurisdiction, and attempting to defeat the action on that ground, the defendant came into court and asked for affirmative relief. Having failed to secure the relief requested, it was properly held that the defendant could not then deny the power of the court to grant that relief. In the case at bar, the procedure to be followed by appellant was set out in the appropriate statute, and there would have been no excuse for the disregard of that procedure and the arbitrary abandonment of service by appellant.

Appellant has never claimed that the Illinois Commerce Commission did not have jurisdiction of the matter. Appellant's claim before the Commission was that under the facts and the law, the only proper order the Commission could make was one in accordance with the request of petitioner. Such a claim is not equivalent to a claim that the Commission had no jurisdiction to enter any order at all.

(3) *The Law of Illinois with Respect to Switch Tracks.*

In the third section of their statement, appellees argue that under the law of Illinois, a switch track constructed across public streets or highways and connected with the main line of the railroad is a part of such railroad and is subjected to public use. The last decision on the subject is that in the *Von Oven* case, 317 Ill. 334, cited by appellees. Reviewing the earlier decisions, the court said at page 344—

> "We are of opinion that the rational meaning and effect of the decisions are, that a railroad company and the private owner of an industry cannot by any agreement or arrangement between themselves build a switch track and limit its use to certain shippers, but when it is constructed it is open to public use and

> regulation without regard to who paid the cost of construction. The law requires the railroad company with which it connects to so operate it and for that purpose regards it as the track of the railroad company. * * *"

It will thus be seen that switch tracks constructed by shippers have not been heretofore considered, for all purposes, as parts of the railroad with which they connect. They have only been held to be so for purposes of use and regulation.

In the case at bar, however, it has been held that such a switch track is not only subject to public use and regulation, but is so much a part of the railroad with which it connects, that such a railroad, although not owning the track, is required to assume all the burdens of such ownership. It is the declaration of this rule of local law which justifies the appeal herein.

(4) *The Obligation of Appellant, under Illinois law, to Maintain the Track here Involved.*

In the fourth section of their statement, appellees argue that appellant, having the possession and exclusive use of the track in question, is under a legal obligation to maintain the track and keep it in repair. A number of Illinois cases are cited in this connection, but it is not necessary to discuss them, as none of them have application to the case at bar. The decision in the case at bar is the only one of its kind in Illinois, and it, of course, does impose upon appellant the burden of maintaining the track, in question.

It is incorrect to say, however, that appellant has possession of the track involved. It has, perhaps, the obligation to use the track, so long as it is physically capable of being operated, for the purpose of giving service to appellees, but that is all. The track still belongs to one or more of the industries served thereby, and presumably could be

taken up and removed by them, if the necessity for railroad service disappeared.

(5) *Previous Decisions of this Court.*

Appellees argue in the fifth section of their statement that the question presented in this appeal is foreclosed by previous decisions of this Court, and four cases decided by this Court are cited in support of that statement. Three of these cases were cited in paragraph 5 of appellant's statement of the basis upon which this Court has jurisdiction upon this appeal to review the judgment of the Supreme Court of Illinois. In none of the cited cases is there any language which can be construed as supporting the conclusion reached by the Supreme Court of Illinois. On the contrary, all of the decisions cited indicate a contrary view, these matters being pointed out in appellant's jurisdictional statement.

Thus in the *Union Lime Co.* case, 233 U. S. 211, the track involved was to be owned by the railway company, and this Court pointed out (p. 222) the distinction between spurs owned and operated by a common carrier under its public obligation, and private sidings. In the *Ochs* case, 249 U. S. 416, it was also said (p. 419) that the track there involved was to be the property of the railroad company and wholly under its control. In the *Lake Erie & Western Railroad Co.* case, 249 U. S. 422, the track involved was to be owned by the railroad company, which, as held by this Court (p. 425) would be entitled to make a reasonable charge for its use. In the *Western & Atlantic* case, 267 U. S. 493, the switch track involved was presumably built and owned by the railroad, since as stated by this Court (p. 494) it was entirely upon the railroad right of way.

There is nothing in these decisions indicating that a railroad company may be required to maintain at its own ex-

pense switch track not constructed by it, now owned by it, and not located upon its right of way. The only inference to be drawn from the decisions is that in the absence of such ownership and the rights deriving therefrom, such a burden may not be cast upon a railroad.

Under Illinois law, a railroad cannot be required to construct a switch track off its right of way. Its only obligation under that law is to construct upon its right of way, with approval of the Commerce Commission, a connection with a switch track constructed by shippers or consignees off the railroad right of way. And upon the construction of such a track by a shipper, another may use it only if he pays a proper part of the cost of construction (Sec. 45, Ch. 111⅔, Ill. Rev. Stat. 1937; Sec. 181, Ch. 114, Ill. Rev. Stat. 1937). The statutory provisions relating to this subject were considered in *Terminal Railroad Association* v *Cain-Hurley Lumber Co.*, 241 Ill. App. 364, in which case it was held that neither at common law, nor under statute was there any obligation on the part of a railroad company to construct track off its right of way. It is also true that under Illinois law, a railroad company has no right to condemn property for the purpose of switch or side track construction. *Limits Industrial R. Co.* v. *American, etc., Works*, 321 Ill. 101, 107.

Thus, appellant could not have been required to build the track here involved, and could not have condemned a right of way for that track even if it had desired to do so. It is true that under decisions of the Supreme Court of Illinois, it has been held that a switch track of the sort here involved, when once constructed by a shipper and connected with a railroad main line, becomes a track open to use by the public and subject to public control. Decisions of this sort are *C. C. C. & St. L. R. Co.* v. *Commerce Commission*, 315 Ill. 461, 474; *St. L. S. & P. R. Co.* v. *Commerce Commis-*

sion, 309 Ill. 621, 625, 628; *Public Utilities Commission* v. *Smith*, 298 Ill. 151, 157; *Public Utilities Commission* v. *Kuhn*, 296 Ill. 513, 515; and *Public Utilities Commission* v. *L. E. & W. R. Co.*, 277 Ill. 574, 582; 249 U. S. 422.

In many of these cases, however, the track involved was one constructed by the railroad, owned by it, and located upon its right of way; and in every case it was only held that such a track became part of the railroad with which it was connected for purposes of use and regulation by the public. In no decision prior to the decision in this case, was it held that obligations of a railroad with respect to service and regulation included also the obligation to maintain property owned by others.

Appellant contends that since, under Illinois law, the obligation of a railroad to give service off its right of way cannot and does not arise until the shipper has constructed a track for the purpose, the obligation does not continue beyond the time during which the track is maintained by the shipper in a physical condition which permits the giving of the service. Appellant further contends that the requirement of the Illinois Commerce Commission, upheld by the Supreme Court of Illinois, imposes upon it an obligation which goes beyond its agreement and the dedication of its property to public use; that this requirement compels it, in effect, to extend its railroad beyond the limits of its own right of way, although not securing thereby any rights of ownership in such extended line, and thus imposes upon it burdens in violation of its rights in the federal Constitution.

The question here involved is one of major importance, both to amounts and principle. The annual expenditure required in the case of the track under consideration is by no means insignificant. Appellant has hundreds of instances in Illinois of switch tracks connecting with its rails, but

not owned by it or upon its property, and which switch tracks are now maintained by the industries owning the tracks and being served over them. Under the rule announced by the Supreme Court of Illinois in this case, the future burden of such maintenance will, in the case of each such track, be cast upon appellant. Every other railroad operating in the State will be in the same situation.

It may not be doubted that the right of ownership of railroad property is entitled to the protection of constitutional guarantees. *Western Union Telegraph Company* v. *Pennsylvania Railroad*, 195 U. S. 540, 570; *Atlantic Coast Line Railway Company* v. *Commission*, 206 U. S. 1, 20; *Missouri Pacific Railway Company* v. *Nebraska*, 217 U. S. 196, 206; *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 595. The rule has been applied in a variety of ways. *Missouri Pacific* v. *Nebraska*, 164 U. S. 403; *C. B. & Q. Railroad* v. *Chicago*, 166 U. S. 403, 417; *C. B. & Q. Railroad* v. *Commissioners*, 200 U. S. 561; *C. M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491.

In this case, appellant is compelled to spend its money in discharging the obligations of others and to supply facilities which should be supplied by others. It is required to do more than it has engaged to do as a common carrier. It is required to assume the financial burdens of ownership without having that ownership. We submit that it may not be required to do so under the decisions of this Court. The decisions in *I. C. C.* v. *Oregon Washington R. Co.*, 288 U. S. 14, 33, 41; *Atchison, etc., R. Co.* v. *Railroad Commission*, 283 U. S. 380, 395, 396, and *Missouri Pacific R. Co.* v. *Nebraska*, 217 U. S. 196, 207, are conclusive on the subject.

Conclusion.

We submit that under the facts in the law, the federal question here involved is certainly substantial enough to justify this Court in passing upon it. So far as we know there is no decision of this or any other Court imposing upon a railroad company the obligation of maintaining track not constructed by it, ~~now~~ owned by it and not on its property, in order that the owner may receive the benefits of railroad service by means thereof.

Appellees apparently rest under the impression that the continued maintenance and operation of the track here involved by appellant will be a tremendous benefit conferred upon appellant. It is argued that appellant should not receive the benefits accruing from the operation of the track and yet escape the obligation to maintain it. The record does not show that appellant receives any profit or other benefit from the operation of the track. The relative benefit to the parties would seem to be indicated by their position in this case, appellant seeking to abandon service, if the industries will not maintain the track, and the industries insisting upon continued operation.

Appellees fail to distinguish between track owned by appellant and supplied by it in pursuance of its public obligations, and track constructed by individual industries for their own benefit and operated in their exclusive interests. If appellant is wrong in the contention which it now makes, then any shipper constructing switch track, as he would be required to do under the law of Illinois, may automatically extend the line of an existing railroad against its will, by connecting his switch track with such railroad. This action would impose upon the railroad the burden of maintaining and operating such track, but without conferring upon it all benefits which might accrue from ownership.

The record in the case at bar shows that at the present time the track involved is in need of substantial repairs and that some portion of the amount thus spent should be charged to capital account under the accounting of the Interstate Commerce Commission (A. 110, 111). But such a charge cannot be made, since the track does not belong to appellant. Again, appellant having made such improvements in the track, the four industries now served thereby may conclude that they no longer need service over the track. Having so concluded, we know of no reason why the track could not be taken up and ownership of all materials in the track assumed by the owner; any amount spent by appellant in capital improvements thus becoming an enforced gift for the benefit of the owner of the track. We submit that under the federal Constitution, appellant may not thus be deprived of its property, and that the motion to dismiss or affirm should be denied.

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